

APPEAL NO. 93182

Under the provisions of the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq.* (Vernon Supp. 1993) (1989 Act), a contested case hearing was held in (city), Texas, on October 27, 1992 and February 18, 1993, (hearing officer) presiding as hearing officer. He determined that the appellant's (claimant) current back complaints are not related to his ankle injury of (date of injury), and that he has not sustained disability related to his ankle injury of (date of injury). Claimant disagrees with a number of the hearing officer's findings of fact and one of his conclusions of law and asks that we reverse the decision. Respondent (carrier) urges that there is sufficient evidence to support the findings of fact and conclusion of law and requests that the decision of the hearing officer be affirmed.

DECISION

Determining that a significant finding of fact does not find support in the evidence, the decision of the hearing officer is reversed and the case is remanded.

Initially, we note that this contested case hearing was continued on several occasions (initially scheduled to be heard on October 14, 1992) to give the claimant abundant time to seek and obtain legal counsel and/or assistance of the ombudsman. Repeated and complete advice was detailed by the hearing officer, which we commend, and we can only conclude the claimant made an informed choice to forego assistance or representation at the hearing.

The hearing officer set forth the evidence in his Decision and Order and, except for one significant matter, we determine his recitation can be adopted for purposes of this decision. Succinctly, the claimant testified that on (date of injury), he twisted his ankle and fell against a wall while carrying a heavy object while on the job. He reported the matter to a supervisor and was offered the immediate opportunity to go to a doctor. The claimant declined, signed a form, and continued working for the next four months without, according to witnesses, any indication of pain or impairment. On December 21, 1991, he requested and went to a clinic where he complained of back pain. He was examined and a medical report was prepared. Because of the apparent conflict in the nature of the injury, the employer had him return to the clinic where he complained of foot, ankle, leg and back problems. According to the doctor's report, the claimant gave vague and conflicting histories, complained of different problems from examiner to examiner at the clinic (this was a result of a language barrier according to the assertions of the claimant), had no evidence of sciatica or a back problem, and had no swelling or indication of a problem in his ankle. The doctor did not assess the claimant's credibility very highly and indicated it was very unlikely that the claimant's ankle problem four months earlier was the cause of the claimant's current "constellation of symptoms." The report also indicated that the claimant had back surgery in 1985. A referral doctor, (Dr. L), (a neurologist), stated in a report dated January 8, 1992, that examination showed no evidence of weakness, sensory loss, or reflex asymmetry, but that the claimant had tenderness in the

right paralumbar and suprascapular region. His impression was lumbosacral strain syndrome, cervical strain syndrome, and right ankle sprain, and he stated further diagnostic tests and physical therapy were indicated. Dr. L also stated, in a letter dated February 20, 1992, (Claimant's Exhibit 12) that "we feel that the treatment (claimant) received in my office was, in reasonable medical probability, a result of the injury of (date of injury); was reasonable and necessary; and was done at the request of the referring physician. . . ." It is this evidence that gives us trouble and causes our reversal and remand.

The hearing officer in his discussion of evidence and, more importantly, in his Finding of Fact No. 18 states:

18.(Dr. L) provided no indication that the Claimant's problems were related to the twisted ankle of (date of injury).

In his discussion of the evidence the hearing officer stated that:

(Dr. L) provided no indication that the Claimant's problems were related to the twisted ankle of (date of injury). This information, in conjunction with (clinic doctor's report) that it was very unlikely that the Claimant's ankle problem four months before was the cause of the Claimant's current constellation of symptoms, makes it clear that the Claimant has failed to show by a preponderance of the evidence that his twisted ankle of (date of injury), was the cause of his other medical problems in December of 1991, and continuing.

Given the state of the evidence in this case and the apparent inadvertent oversight of this significant piece of evidence, we cannot conclude this is harmless error (Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ); Texas Workers' Compensation Commission Appeal No. 93096, decided March 15, 1993; Texas Workers' Compensation Commission Appeal No. 92282, decided August 12, 1992; Texas Workers' Compensation Commission Appeal No. 92028, decided March 11, 1992), or that the particular finding of fact in question can be disregarded. See *generally* Texas Workers' Compensation Commission Appeal No. 92135, decided May 18, 1992; Texas Workers' Compensation Commission Appeal No. 92088, decided April 12, 1992. We further cannot conclude, one way or the other, with any degree of certainty that it is unlikely that a different result might not have been reached had this evidence been properly considered. Accordingly, we reverse and remand the case for further consideration, not inconsistent with this opinion, and development of evidence as deemed necessary and appropriate by the hearing officer. We do not find merit to the claimant's

remaining assertions of error.

A final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's division of hearings, pursuant to Article 8308-6.41. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge